

GORDON H. SMITH
OREGON

United States Senate

WASHINGTON, DC 20510-3704

May 2, 2007

AL-67-008-7797
DUR 5/21/07

COMMITTEES
FINANCE

COMMERCE, SCIENCE, AND TRANSPORTATION
ENERGY AND NATURAL RESOURCES
INDIAN AFFAIRS

RANKING MEMBER, SPECIAL COMMITTEE ON AGING

Ms. Stephanie Daigle
Associate Administrator, Congressional Affairs
Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Room 3426
Washington, DC 20460

Dear Ms. Daigle:

Mr. Robert Kerivan has written to me again regarding EPA enforcement actions against his business. I have enclosed a copy of this most recent correspondence for your information. Your consideration of this additional information would be appreciated.

After you have completed your review, please send your findings and comments to my Portland office at One World Trade Center, 121 SW Salmon, Suite 1250, Portland, Oregon 97204.

Thank you for your continuing attention to this inquiry

Sincerely,



Gordon H. Smith
United States Senator

GHS:jsr
Enclosure

April 19, 2007

Senator Gordon Smith
Washington DC

Dear Senator Smith,

Thank you for your letter of April 12, 2007 and enclosing a copy of the report from the EPA, signed by Elin D. Miller, Regional Administrator. However, the EPA and the Corps are up to their old tricks, giving you, the Senator, false information. In the last paragraph of their letter they state that Sucker Creek is a "continually flowing body of water". As I have lived next to this creek for 25 years, I know it goes dry every other year or so. They also state the Illinois River is a "navigable-in-fact body of water". That is not true as the Rogue River is navigable only from the ocean to the town of Agness, about 30 miles up river. After that point there are numerous waterfalls. The Illinois River flows into the Rogue River upriver from Agness and flows about forty miles or so upriver and rises to 1600-foot elevation before Sucker Creek enters the Illinois River. I have enclosed a copy of a list of navigable river that the Corps puts out and for which they are responsible. As you can see the Illinois River and Sucker Creek are not named among them, and the Corps does not feel they are responsible for the Illinois River or Sucker Creek in the Illinois Valley. It would be nice if they did help protect our waters, but when there is a flood they are all home hiding under their mothers' bed.

Now to explain, the work I had done was covered by a State Court injunction, issued against the Oregon Division of State Lands. The judge held court in the riverbed itself on my property and stated, "You would have to be a blind man not to see the damages the creek has caused the Kerivan property" and upheld the injunction to allow us to repair. We fixed the problem and it only took 11 man-hours, some riprap, cat work, and backhoe work. It made the DSL mad as the injunction said they could not interfere. So they turned us into the Corps and the EPA.

Then after the Raponas case the U.S. Supreme Court ruled the Corps does not have jurisdiction over non-navigable waters and adjacent wetlands. The EPA put out a memorandum of understanding two weeks after the U.S. Supreme Court ruled, that they would be sending out a new jurisdictional memorandum. That was over a year ago, but the EPA still has not expressed those rules as you can see in their letter.

All I have been asking of you, my U.S. Senator, was to force the EPA to accept the U.S. Supreme Court's decision or prove why they do not need to. But they have misled you with false information. I thought that no man or woman was above the law, but it looks like the EPA and the Corps are an exception.

Waiting for your reply.

Robert E. Kerivan

taking a position on the legal issue presented by the Supreme Court decision.



April 19, 2007

Honorable Gordon H. Smith
United States Senate
One World Trade Center
121 S.W. Salmon Street, Suite 1250
Portland, OR 97204

Re: In the Matter of Robert Kerivan and Bridgeview Vineyards,
EPA Docket No. CWA-10-2005-0124

Dear Senator Smith:

Thank you for forwarding the Environmental Protection Agency' (EPA) letter dated March 27, 2007. I wish to make you aware of two errors in the EPA letter.

I do not wish to go through the history of EPA's harassment of my business and me due to the repairs we made to existing riprap on our vineyard to protect our vineyard roads. It is sufficient to note that the EPA ignored exemptions and general authorizations under the Clean Water Act (CWA). The exemptions they ignored are:

1. 33 USC 1344(f)(1) (the Farm Exemption Provisions) exempts road repair and maintenance and repair to damaged riprap from any permitting requirement; and
2. The general authorizations under 33 USC 1344(e) that expressly allows stream bank stabilization repairs, provided no more than 500 lineal feet of stream bank or more than 500 cubic yards of fill are involved. See Nationwide Authorization No. 13. Our repair involved 150 to 175 lineal feet, not more than 150 cubic yards of riprap (taken from excess riprap previously existing on the vineyard). This excess riprap was placed on the property when roughly 2,500 feet of diking and riprap was installed in the late 1960s (some 14 years before I purchased the property) to prevent Sucker Creek from flooding the farm.

The reason I write this letter is because of the two erroneous statements on page 2 of EPA's letter. I request that you challenge these two inaccuracies on our behalf. I do so because EPA's continued course of conduct, which is to act contrary to the law, must be challenged.

I have read the *Rapanos* decision from the Supreme Court, had my lawyer's read it and I have attended a seminar on that decision.

That decision states that the Corps' and EPA's jurisdiction under the CWA is over "traditional navigable waters" (i.e., known as Section 10 waters under the Rivers and Harbors



Act) and wetlands adjacent to traditional navigable waters. The *Rapanos* decision rejected the agency's assertion that they have CWA authority over "remote waters" based on a hydrologic connection to traditional navigable waters.

The U.S. Army Corps of Engineers (the Corps) maintains a listing of "traditional navigable waters" in Oregon. I attach the most recent listing of traditional navigable waters as Exhibit A. Sucker Creek, which is the free flowing stream that flows by our vineyard and into the east fork of the Illinois River (approximately one mile downstream from our vineyard), is not listed. Neither is the east fork of Illinois River or the Illinois River listed as "traditional navigable waters" (Section 10 waters).

Yet, the Regional Administrator has represented to you in the March 27 letter (on page 2) that the Illinois River is "a navigable-in-fact body of water." This representation is erroneous. The Corps' listing of navigable waters ends on the Rogue River, at Agnes, Oregon (roughly 27 miles from the Pacific Ocean).

Under *Rapanos*, EPA's CWA jurisdiction does not extend to "remote waters" (whether wetlands or tributaries). Sucker Creek is a remote water located 47 miles from any traditional navigable water (the Rogue River at Agnes, Oregon) or any wetland adjacent to traditional navigable waters.

The EPA exceeded the extent of its jurisdiction under the CWA in grand fashion (by roughly 47 miles) when asserting I conducted activity in waters subject to the CWA and harassed me into paying \$11,000. It now is clear the EPA agents had no authority whatsoever under the law over Sucker Creek. In short, I was mugged by EPA.

The second misrepresentation by the Regional Administrator pertains to interim guidance issued by the Corps and EPA after the *Rapanos* decision. When I telephoned Ms. Hillsman, she indicated there was no such guidance issued. The Regional Administrator's March 27, 2007 letter to your office also so states there is no interim guidance.

My lawyers have provided me the attached e-mail which shows that interim guidance was issued by the Corps on July 5, 2006 (three weeks after the *Rapanos* decision).

I find it astonishing that the Regional Administrator of EPA has told your office there is no such guidance when such guidance exists.

The guidance clearly states that agency officials when dealing with areas other than "traditional navigable waters" are to avoid taking positions on CWA jurisdiction over remote waters because the *Rapanos* decision has limited the agencies' jurisdiction. Further, the July 5, 2006 guidance states that the agency personnel are not to take positions on jurisdiction over remote waters even in cases pending in court, and that no further enforcement referrals

BRIDGEVIEW VINEYARDS



should be made to the United States Department of Justice regarding CWA violations, unless they relate to "traditional navigable waters" (*i.e.*, Section 10 waters).

As I stated earlier, I have been mugged by the EPA. Unless they can show your office where and when the Illinois River, which rises 1600-feet in elevation, became a "traditional navigable water" (*i.e.*, a Section 10 water), they should admit their mistake and refund the \$11,000 they took from my company.

I thank you and your office staff for the kind help in making the initial inquiry to the EPA and hope that you will be persistent in following up on the EPA's erroneous statements. We need federal agencies to follow the law, and stop harassing innocent farmers who are merely conducting repairs on their lands to maintain the productivity of the same.

Sincerely, ?


Robert Kerivan

NAVIGABLE RIVERWAYS WITHIN THE STATE OF OREGON.

Portland District - Corps of Engineers

October 1993

Approved (Signature)

Resurvey?

Waterway	Navigable Length (Miles)	Remarks
Alsea River	11.2	From base Pacific Ocean at Waldport, Oregon. Head at headwaters in mile 11.2.
Barren Slough	0.1	Thibault of Lewis & Clark River. Head 1.1 miles upstream of old US 101 Bridge. Head at base.
Beaver Slough (Clatsop)	0.7	Thibault of Columbia River (Clatsop Slough). Head at US 30 Bridge.
Beaver Slough (Including 0.7 in Walden Slough)	3.8	Thibault of Columbia River at Clatsop, Oregon. Includes waters surrounding Astoria Island and to Klaskanen Cr.
Big Creek (Clatsop)	0.5	Thibault of Columbia River (Clatsop Slough). Head 0.5 miles downstream of county road bridge at mile 1.1.
Binder Slough	0.4	Thibault of Youngs River. Mouth 1.4 miles upstream of Walden River. Head at head of.
Blind Slough (Columbia R)	2.5	Thibault of the Columbia River at Knappton, OR. Head at base Creek.
Boonville/Middle Channel	7.0	Side channel of Willamette River. Three miles upstream from Clatsop, OR.
Boiler Creek	1.1	Thibault of South River. Mouth 1 mile from headwaters, OR. Head at head bridge at mile 1.1.
Campbell River	0.5	Thibault of Willamette River. Mouth at Albany, OR. Head 0.1 mile downstream of OCHN bridge at mile 0.6.
Cary Slough	0.3	Thibault of Columbia R at Knappton, OR. Head at railroad bridge.
Catching Slough	7.0	Thibault of Coos River. Mouth 1 mile east of Coos Bay, OR. Head at Lane River Bridge.
Chasco River	3.5	From base Pacific Ocean at Brookings, OR. Head at mouth of Cary Creek.
Chickamauc River	0.4	Thibault of the Willamette River at Oregon City, OR. Head at 1.1 mile upstream of Highway 98 bridge.
Clatskanie River	1.4	Thibault of Beaver Slough at Clatskanie, Oregon. Head at US Highway 30 Bridge at mile 1.4.
Coquille Slough	2.2	Thibault of Johnson Slough at Coos Bay, OR. Head at distance.
Columbia River	309	To Washington state boundary. Portland District upstream boundary line is 200.4, up to but not including Unimilla American Bridge.
Columbia Slough	8.4	Thibault of Willamette River. Mouth at Willamette River mile 1.1. Head at Canal Closure No. 2.
Coos River	15.6	Includes South Fork. From base Coos Bay at Coos Bay, OR. Head at Coos River Fish Hatchery.
Coquille River	34.0	From base Pacific Ocean at Seaside, OR. Head at mouth of North and South Forks.
Crescent Slough (See Willamette Slough)		
Daily Creek	4.5	Thibault of Tualatin River. Mouth 1 mile south of Hillsboro, OR. Head at Verbena Road Crossing.
Davis Slough	1.0	Thibault of Johnson Slough. Head at Johnson.
Dean Creek	1.5	Thibault of Longview River 3.5 miles upstream of Madras, OR. Head 0.5 mile downstream of Johnson Creek at mile 2.0.
Dopco Slough	1.1	Thibault of Tualatin River at Tualatin, OR. Head at road bridge 1.1.
Dougherty Slough	1.7	Thibault of Trask River at Tillamook, OR. Head at railroad crossing at mile 1.5.
Drift Creek (Alsea)	2.7	Thibault of Alsea River. Mouth 1 mile east of Waldport, OR. Head at road bridge.

Exhibit A

NAVIGABLE RIVERWAYS WITHIN THE STATE OF OREGON
Portland District - Corps of Engineers.

October 1993

Waterway	Authorized Project (Miles)	Remarks
Drift Creek (Sluice)	1.0	None
Driscoll Slough	0.3	None
Duncan Inlet	4.5	None
Elk Creek (Yaquina)	4.0	None
Fletcher Slough	0.5	None
Frantz Creek	0.5	None
Gilbert River	5.8	None
Goble Creek	0.2	None
Green Slough	0.2	None
Grindy Slough	0.4	None
Hathaway Slough	0.4	None
Haynes Inlet	2.0	None
Hogwarton Slough	2.0	None
Hudson Slough	1.0	None
Isthmus Slough	9.9	2.3
Jeffries Slough	0.1	None
Joe May Slough	2.2	None
John Day River (Chenap)	4.3	None
John Slough	0.5	None
Klickis River	1.4	None
King Slough	1.4	None
Klaskanine River	1.6	None
Larson Slough	0.1	None
Lawson Creek	0.5	None
Lewis and Clark River	8.0	2.7
Lint Slough	0.5	None
McCaferry Slough	1.0	None

X {
 Illinois
 River
 not
 listed

NAVIGABLE RIVERWAYS WITHIN THE STATE OF OREGON

Portland District - Corps of Engineers

October 1993

Authorized Professional

Surveyor

Waterway	Navigable Length (Miles)	Remarks
McKenzie Slough	0.5	Thibault of Umpqua River at Westport, OR. Mouth adjacent to head upstream of Schell Creek.
McKenzie River	37.0	Thibault of Willamette River. Confined to 7 miles south of Eugene. Head at "Dutch Henry Rock" approximately 1.3 miles downstream of Loring Dam. Declared navigable by 9th Circuit Court decision in 1923.
Mill Creek (Umpqua)	1.7	Thibault of Umpqua River. Mouth 12 miles upstream from Redding, OR. Head at fork of creek.
Mill Creek	8.7	Branch of Coos River. Head at confluence of west to east fork at Allegany, OR.
Mathews Channel	21.8	Side channel of Columbia and Willamette Rivers.
Newman Creek	2.0	Thibault of Newman River at Seaside, OR. Head at 2nd Avenue to Seaside, OR.
Newman River	3.0	Mouth into Pacific Ocean at Seaside, OR. Head at foot bridge for golf course.
Nehalem River	7.3	Mouth into Pacific Ocean 3 miles SW of Warrenton, OR. Head at Nehalem Bay at upper end of Lanes Island. Head of river at confluence with bridge at river mile 7.2.
Nehalem River, North Fork	5.1	Thibault of Nehalem River. Mouth 1.0 mile from Nehalem, OR. Head at South Creek.
Nehalem River	7.0	Mouth into Pacific Ocean, 2 miles south of Pacific City, OR. Mouth of Nehalem River on Nehalem Bay 1.4 miles downstream of bridge at Pacific City, OR. Head of river at Cloverdale Woods bridge, river mile 7.0.
Nehalem River, Little	1.6	Mouth into Nehalem Bay 2 miles SE of Pacific City, OR. Head 1.0 mile upstream of US 101 bridge at mile 1.4.
North Slough	3.0	Thibault of Coos Bay. Mouth 2 miles north of North Bend, OR. Head at US 101 bridge at Harney.
Onda Creek	1.5	Thibault of Umpqua River at Toledo, OR. Head at mouth line between sections 8 and 17.
Owango Canal	1.8	Channel head of Lake Owango with Tualatin River at mile 6.
Owango Lake	Public Law 94-587 1154 (Water Resources Development Act of 1976) removed Lake Owango from Section 10 jurisdiction	
Ouer Slough	1.0	Thibault of South River. Mouth 5 miles upstream from Harpsport, OR. Head at dike.
Pacific Ocean	-	Navigable water in Pacific Ocean along approximately 200 miles of Oregon Coast.
Salmon Slough	0.1	Thibault of Haystack Lake. Head at road bridge.
Pony Slough	1.2	Thibault of Coos Bay at North Bend, OR. Head at road crossing.
Pook Slough	3.5	Thibault of Umpqua River. Mouth 4 miles upstream from Newport, OR. Head at power line crossing.
Powder River	10.3	Thibault of Snake River. Backwater of Mountain Reservoir.
Rincon Slough	0.4	Thibault of Columbia River. Mouth 1.0 miles downstream of Lanesville bridge at Madras, OR. Head at levee.
Rogue River	27.1	Mouth into Pacific Ocean at Gold Beach, OR. Head at Agate, mile 27.1.
Salmon River	4.3	Levee project. Mouth 4 miles north of Lincoln City, OR. Head at US 101 bridge at mile 4.3.

NAVIGABLE RIVERWAYS WITHIN THE STATE OF OREGON
Portland District - Corps of Engineers

October 1993

Waterway	Authorized Project (Miles)	Remarks
Sandy River	9.1	None
Santiam River	9.6	None
Santosh Slough	1.4	None
Schofield Creek	5.3	None
Siletz River	22.6	None
Shuslaw River	21.5	8.0
Shuslaw River, North Fork	4.3	None
Skippanon River	4.5	4.5
Smith River	23.1	21.0
Smith River, North Fork	1.2	None
Snake River	233.3 ^a	None
South Inlet	1.3	None
South Slough (Coos Bay)	7.9	1.3
South Slough (Shuslaw)	1.8	None
South Yamhill River	5.6	5.6
Swan Island Lagoon	1.1	1.1
Tillamook River	5.0	None
Trask River	3.5	None
Tualatin River	56.8	None
Umpqua River (including South Umpqua River)	122.3	11.9
Wahukui River	2.8	None
Wahukui River, Little	0.2	None
Warren Slough	1.7	None
Westport Slough	4.7	0.7

Sucker
Creek
not
listed

NAVIGABLE RIVERWAYS WITHIN THE STATE OF OREGON
Portland District - Corps of Engineers

October 1993

Waterway	Authorized Project (Miles)	Head of Navigation (Miles)	Remarks†
Willamette River	183.3	183.3	Tributary of Columbia River. Forked in Eugene, OR. Head 1 mile upstream of I-5 bridge. Contains Willamette Falls Locks at mile 26.3.
Willamette Slough (Crook Slough)	1.4	None	Tributary of Willamette River (Crook Slough) at Salem, OR. Head distant.
Willamette Slough	0.4	None	Part of Coos Bay. Mouth opposite North Bend, OR. Head at road crossing.
Wilson River	3.9	None	Tributary of Tillamook Bay at Tillamook, OR. Head at mouth of Beaver Creek.
Winchuck River	0.6	-	Tributary of Pacific Ocean immediately north of Oregon California border. Head at US 101 bridge.
Yachats River	1.0	-	Tributary of Pacific Ocean at Yachats, OR. Head 2.3 miles downstream of Salinas Creek at mile 1.2.
Yamhill River (also see South Yamhill R)	11.2	11.3	Tributary of Willamette River Mouth 29 river miles above Oregon City locks. Mouth 29 river miles above Oregon City Locks. Head at confluence of north and south forks.
Yaquina River	22.3	10.0	Flows into Pacific Ocean at Newport, OR. Head of bay at Yaquina, OR. Head of river at Elk City bridge, mile 22.3.
Youngs River	12.4	4.3	Tributary of Columbia River at Astoria, OR. Head of bay and mouth of river at old US 101 bridge. Head of navigation at county road bridge mile 12.4.

† Head refers to head of navigable headwater.

Information contained in this table was obtained from a Public Notice issued 1 May 1981 entitled "Declaration of Navigable Waters of the United States." Three rivers, McKenzie, Powder, and Snake, were added to this table that were not included in the 1981 notice.

Public Law 94-587 (154) (Water Resources Development Act of 1976) Section 10 permits are not required to construct wharves and piers in a navigable water body if located entirely within one state and if navigability is based solely on the historical use to transport interstate commerce. Such historical navigable water courses in Oregon are Delany Creek, Oswego Canal, South Yamhill River, Yamhill River (mile 7 to 11.3), Tualatin River, and Umpqua River (mile 25 (Scamberg) to 12.2). The historical navigability of these rivers (and their referenced reaches) is based on associated information and file information.

From: Sudol, Mark F HQ02
Sent: Wednesday, July 05, 2006 10:25 AM
To: COL-REG-All; COL-REG-CHIEFS; COL-REG-WEC; COL-REG-ROs
Cc: Barnes, Gerald W HQ02; Smith, Chip R HQ0A; Wood, Lance D HQ02;
Stoddard, Earl R HQ02; 'Schneider, Craig R Mr OGC'; Dunlop,
George S HQ0A; Sherman, Rennie H HQ02; Cummings, Ellen N HQ02
Subject: Interim Guidance on the Rapanos and Carabell Supreme
Court Decision

Everyone,

The Supreme Court handed down a decision on June 19, 2006, in the Rapanos and Carabell cases. That decision addresses the scope of Clean Water Act (CWA) jurisdiction over certain waters of the United States, including wetlands. I appreciate the difficulty you are facing in trying to keep an on-going program functioning in the face of the present uncertainty. Given the confusion created by the differing opinions that the Supreme Court justices filed in that case, it will take some time for the Corps and the EPA to analyze and reach consensus on what legal guidance is to be derived from the decision. In the near future we intend to issue joint EPA/Army guidance clarifying CWA jurisdiction in light of the Rapanos/Carabell decision.

We anticipate that the Rapanos/Carabell decision will lead the Corps and the EPA to make some changes in how we describe and document the justifications that underlie some of our CWA jurisdictional determinations (JDs). In other words, the tests that we cite and the facts that we document in some of our JD administrative records will probably change somewhat, to insure that our JDs reflect the Supreme Court's most recent legal tests for asserting CWA jurisdiction. We will try to send you our advice in this regard as soon as possible and in the very near future.

In the meantime, in order to allow the Corps and EPA to prepare and issue substantive guidance, I am recommending that, to the extent circumstances allow, you delay making CWA jurisdictional determinations for areas beyond the limits of the traditional navigable waters (i.e., outside the "Section 10" waters) for the next three weeks. Even though you should delay making CWA jurisdictional calls in areas outside the traditional navigable waters for the next three weeks, that does not mean that the processing and issuance of CWA permit authorizations in those areas using general permits and standard individual permits should be delayed, as is further explained below.

I also recommend that, until that substantive guidance is circulated, no Corps District or Division Office should announce or implement any change in (1) how we are documenting our jurisdictional determinations, or (2) regarding the areas over which we are asserting CWA jurisdiction, without prior coordination with and concurrence by Headquarters Regulatory Community of Practice and Headquarters Office of the Chief Counsel.

Exhibit B

404 permit covering activities outside the traditional navigable waters where permit issuance is feasible during the next few weeks, but where special conditions of the proffered permit would require the permittee to provide compensatory mitigation, and where that permittee might believe that some or all of his activities are now not subject to regulation under CWA Section 404 because of the Rapanos/Carabell decision, and thus that the mitigation requirements of the permit are excessive or unnecessary. In such a circumstance the Corps should inform the permit applicant that he or she has a number of options, as follows: The permit applicant can accept and sign the proffered permit now, with its existing terms and conditions; or the permit applicant can ask for a delay in the issuance of the permit until the Corps District has received substantive Rapanos/Carabell guidance from Corps Headquarters, so that the amount of required compensatory mitigation can be re-evaluated (if appropriate) based on that new guidance.

For Corps CWA Section 404 permit authorizations made during the next few weeks for activities outside the traditional navigable waters pursuant to either a general permit or a standard individual permits, where the permittee later concludes that the terms or conditions of that permit authorization are inappropriate in light of the Rapanos/Carabell decision, that permittee can ask the Corps to modify the terms or conditions of that permit to rectify the matter subsequent to the issuance of the anticipated EPA/Army substantive Rapanos/Carabell guidance.

Corps Headquarters POCs are Mark Sudol and Russ Kaiser (Regulatory COP), Lance Wood (CCB), and, for litigation and enforcement matters, Martin Cohen (CCL).

EPA INTERNAL GUIDANCE

Initial Guidance on Supreme Court's Wetlands Decision

As you know, on June 19th the Supreme Court issued a decision in the consolidated wetlands cases. OGC, CECA, and CW are studying the opinions and do not yet have an Agency position on them. In the very near future, we intend to issue guidance on how the Agency should proceed in light of the decision. Until then, Agency personnel should not represent an Agency position on the effect of this decision on Clean Water Act jurisdiction in pleadings or in dealings with outside parties.

Therefore, in situations that require taking a position on the scope of "waters of the US" under the Clean Water Act, e.g., briefs or other filings in judicial or administrative proceedings, you should defer action if possible. We recommend seeking an extension for any briefs due in administrative or judicial cases in the near term. By way of example, the U.S. sought an extension of 60 days for a brief in *United States v. Cundiff*, Nos. 05-3469 and 05-5905 (5th Cir.) due June 21st.

Ongoing work in Clean Water Act cases, such as settlement negotiation meetings or inspections, should continue if that work does not require